Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–02–29 OF 1997

MOKHTAR SIDIN, MOHD SAARI AND ALAUDDIN JJCA

31 DECEMBER 2001

Administrative Law *— Exercise of administrative powers — Dismissal from service — Police force — Natural justice — Whether omission to hold oral hearing tantamount to failure on to afford appellant reasonable opportunity of being heard — Whether proceedings conducted in accordance with natural justice*

Police *— Disciplinary proceedings — Dismissal — Natural justice — Oral hearing — Whether omission to hold oral hearing tantamount to failure to afford appellant reasonable opportunity of being heard — Whether proceedings conducted in accordance with natural justice*

In the suit before the Seremban High Court, the appellant had claimed, inter alia, for a declaration that his dismissal from the police force was unlawful, unconstitutional, void and of no effect. The suit was dismissed by the High Court, hence this appeal by the appellant. The first respondent had caused summary of facts, report and statement of witnesses ('the documents') to be circulated to the members of the first respondent for the purpose of determining whether there was a prima facie case against the appellant. The documents were however not made available to the appellant. Subsequently, a show cause letter was sent to the appellant, which contained the four charges preferred against the appellant. In response to the letter, the appellant made a representation to the first respondent vide his letter of 23 July 1995 ('the letter'). Upon receipt of the letter, the first respondent convened a meeting to deliberate over the alleged disciplinary offences committed by the appellant. At that meeting, by majority decision, the members decided to dismiss the appellant and that decision was conveyed to the appellant by letter. No committee of inquiry was set up.

Held, allowing the appeal:

(1) In the letter, the appellant denied receiving any bribe in answer to the first and second charges and made reference to a statutory declaration sworn by Sanmugam in which Sanmugam denied receiving the money or giving it to the appellant. Sanmugam was a police personnel who served under the appellant. Based on the unchallenged evidence of Sanmugam in the court below, Sanmugam did not give any money to the appellant (see p 135G–H).

(2) In respect of another charge, the appellant was accused for failing to report about illegal gambling activities in Seremban. In the

letter, the appellant denied having any information about illegal gambling activities in Seremban as he was not in charge of criminal investigation (see pp 135I–136A). A

(3) In applying O 26(4) of the Public Officers (Conduct and Discipline) (Cap 'D') General Orders 1980 to the facts and circumstances of this case, the appellant had, by the letter, given sufficient exculpatory statement to rebut all the four charges. On the other hand, there was no evidence whatsoever by the defence to substantiate the four charges. Further, there was no evidence whatsoever to rebut or contradict the appellant's exculpatory statement (see p 136B–C, E–F). B

(4) The trial judge had misdirected himself when he held that, having regard to the appellant's complete denial of the charges, the commission did not err in its discretion not to proceed further by way of an oral hearing (see p 136F–G); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 distinguished. C

(5) Since there was no evidence whatsoever to contradict the appellant's exculpatory statement, it would be justifiable to hold an oral hearing or enquiry. As such, the omission to hold an oral hearing was tantamount to a failure on the part of the first respondent to afford the appellant a reasonable opportunity of being heard. Further, the documents were not supplied to the appellant. That being the case, it became all the more necessary for the oral hearing to be held (see pp 136H–137A, C). D E

(6) Therefore, the proceeding, which resulted in the dismissal of the appellant, was not conducted in accordance with natural justice as enshrined under art 135(2) of the Federal Constitution (see p 137H). F

[Bahasa Malaysia summary

Dalam guaman di hadapan Mahkamah Tinggi Seremban, perayu menuntut, antara lain, untuk satu deklarasi bahawa pemecatan beliau daripada perkhidmatan polis adalah menyalahi undang-undang, tidak mengikut perlembagaan, batal dan tidak berkuatkuasa. Guaman tersebut telah ditolak oleh Mahkamah Tinggi, justeru itu rayuan ini. Responden pertama telah menyebabkan ringkasan fakta, laporan dan kenyataan saksi-saksi ('dokumen-dokumen tersebut') diedarkan kepada ahli-ahli responden pertama bagi tujuan menentukan sama ada wujud satu kes prima facie terhadap perayu. Dokumen-dokumen tersebut walau bagaimanapun tidak disediakan untuk perayu. Berikutan itu, sepucuk surat tunjuk sebab telah dihantarkan kepada perayu, yang mengandungi empat pertuduhan yang dibuat terhadap perayu. Sebagai jawapan kepada surat tersebut, perayu telah membuat satu representasi kepada responden pertama melalui surat beliau bertarikh 23 Julai 1995 ('surat tersebut'). Setelah menerima G H I

surat tersebut, responden pertama telah mengadakan satu mesyuarat untuk mempertimbangkan pendakwaan kesalahan tata tertib yang telah dilakukan oleh perayu. Dalam mesyuarat tersebut, melalui keputusan majoriti, ahli-ahli tersebut telah memutuskan untuk memecat perayu dan keputusan tersebut telah disampaikan kepada perayu melalui surat. Tiada jawatankuasa siasatan ditubuhkan.

Diputuskan, membenarkan rayuan tersebut:

(1) Dalam surat tersebut, perayu telah menjawab pertuduhan-pertuduhan pertama dan kedua dengan menafikan menerima apa-apa rasuah dan telah membuat rujukan kepada satu deklarasi statutori yang telah diangkat sumpah oleh Sanmugam di mana Sanmugam telah menafikan menerima wang atau memberinya kepada perayu. Sanmugam adalah seorang polis perjawatan yang telah berkhidmat di bawah perayu. Berdasarkan keterangan Sanmugam yang tidak dicabar di mahkamah bawahan, Sanmugam tidak memberikan apa-apa wang kepada perayu (lihat ms 135G–H).

(2) Berhubung pertuduhan yang lain, perayu telah dituduh gagal untuk melaporkan tentang kegiatan perjudian haram di Seremban. Di dalam surat tersebut, perayu telah menafikan mempunyai apa-apa maklumat tentang kegiatan perjudian haram di Seremban kerana beliau tidak dipertanggungjawabkan untuk siasatan jenayah (lihat ms 135I–136A).

(3) Dalam menerapkan A 26(4) Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 kepada fakta-fakta dan keadaan kes ini, perayu telah, melalui surat tersebut, memberikan kenyataan pembelaan yang mencukupi untuk mematahkan semua empat pertuduhan tersebut. Sebaliknya, tiada keterangan langsung oleh pembelaan untuk mengesahkan empat pertuduhan tersebut. Tambahan pula, tiada keterangan langsung untuk mematah atau menyangkal kenyataan pembelaan perayu (lihat ms 136B–C, E–F).

(4) Hakim perbicaraan telah salah arah apabila beliau memutuskan bahawa, berdasarkan penafian sepenuhnya perayu terhadap pertuduhan-pertuduhan tersebut, suruhanjaya tersebut tidak terkhilaf dalam budi bicaranya untuk tidak meneruskan selanjutnya melalui satu perbicaraan secara lisan (lihat ms 136F–G); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 dibeza.

(5) Memandangkan tiada keterangan langsung untuk mematahkan kenyataan pembelaan perayu, terdapat justifikasi untuk mengadakan satu perbicaraan atau siasatan secara lisan. Oleh itu, peninggalan untuk mengadakan satu perbicaraan secara lisan telah terjumlah kepada satu kegagalan di pihak responden pertama bagi memberi perayu satu peluang yang munasabah untuk didengar. Tambahan pula, dokumen-dokumen tersebut

telah tidak disediakan untuk perayu. Jika demikian kesnya, memang patut untuk satu perbicaraan secara lisan diadakan (lihat ms 136H–137A, C). A

(6) Oleh itu, prosiding tersebut, yang mengakibatkan pemecatan perayu, tidak dikendalikan mengikut keadilan asasi sebagai mana yang diperuntukkan di bawah perkara 135(2) Perlembagaan Persekutuan (lihat ms 137H).] B

Notes

For cases on dismissal of a public servant, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 21–23. C

For cases on dismissal of a police officer, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1095–1119.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 28 MLJ 169 (refd) D

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (distd)

Hotel Equotarial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363 (refd)

Mak Sing Kwong v Minister of Home Affairs, Malaysia (No 2) [1975] 2 MLJ 175 (refd) E

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308 (refd)

Legislation referred to F

Federal Constitution art 135(2)

Public Officers (Conduct and Discipline) (Cap 'D') General Orders 1980 general order 26(4)

Appeal from: Civil Suit No 22–141–1994 (High Court, Seremban) G

Aris Rizal C Fernando (*Maniam Raja* and *Marisa Regina* with him) (*Aris Rizal Christopher Fernando & Co)* for hte appellant.

Mary TS Lim (*Suzana* with her) (Senior Federal Counsels) (Attorney General's Chambers) for the respondent.

Mohd Saari J (delivering judgment of the court): H

Factual background

At all material times, the appellant ('ASP Ang') was assistant superintendent of police. In his evidence, SD1, the secretary of first respondent ('PSC') deposed that upon receiving a report from the I secretariat IGP cawangan tatatertib, caused a summary of facts, report and statement of witnesses to be circulated to members of the first respondent

for the purpose of determining whether there was a prima facie case against the appellant. Subsequently, a show cause letter dated 30 June 1993 (p 76 of the appeal record) was sent to ASP Ang, which contained four charges. In response to the letter, ASP Ang made a representation to PSC vide his letter dated 23 July 1993 (p 80 of the appeal record).

On receipt of ASP Ang's letter, PSC convened a meeting to deliberate over the alleged disciplinary offences committed by ASP Ang. At that meeting, by a majority decision, the members decided to dismiss ASP Ang from service. The decision was conveyed to ASP Ang vide a letter dated 30 December 1993 (p 103 of the appeal record). It is significant to note that no committee of inquiry was set up. Further, it is noted that the report and statement of witnesses were not supplied to ASP Ang.

With regard to the letter dated 30 December 1993 (p 103 of the appeal record), it merely states that ASP Ang be dismissed from service. There was no separate finding of guilt in respect of each of the four charges.

In a suit before the High Court Seremban, ASP Ang claimed, inter alia, for the following:

(i) a declaration that the plaintiff's dismissal from the police force was unlawful, unconstitutional, void and of no effect and that the plaintiff is still an assistant superintendent of police in the Royal Malaysian Police Force and entitled to all the salaries, emoluments and benefits due as such assistant superintendent of police;

(ii) an enquiry to determine the salaries, emoluments and other benefits due to the plaintiff.

The suit was dismissed with costs, hence this appeal.

Issue

The issue for determination is whether the proceeding which resulted in the dismissal of ASP Ang was conducted in accordance with natural justice.

Finding

In his lengthy letter dated 23 July 1993 (p 80 of the appeal record), ASP Ang denied receiving any bribe. In answer to the first and second charge, in his letter, ASP Ang said that he was in possession of the statutory declaration of Sanmugam, in which Sanmugam denied receiving the money or giving it to ASP Ang. In both the charges, ASP Ang was accused of receiving bribes through Sanmugam. Sanmugam was a police personnel who served under ASP Ang in the IPD cawangan mahkamah.

Based on unchallenged evidence of Sanmugam ('SP5') in the court below, Sanmugam did not give any money to ASP Ang.

With regard to third and fourth charge, it was inter-related with the earlier charges. In the fourth charge, ASP Ang was accused for failing to report about illegal gambling activities in Seremban. In his letter, he denied having any information about gambling activities in Seremban. On the basis

that he was not in charge of criminal investigations, he had no access to such information. At all material times, ASP Ang was attached to IPD cawangan mahkamah as a prosecuting officer.

Under O 26(4) of General Orders 1980, it states:

> [I]f the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

In applying O 26(4) aforesaid to the facts and circumstances of this case, we are of the view that, by his letter dated 23 July 1993, ASP Ang had given sufficient exculpatory statement to rebut all the four charges. On the other hand, with regard to the defence's case, we find no evidence whatsoever to substantiate the four charges.

In judicial review cases as here, the court is concerned with whether procedural fairness had been administered and the court has no jurisdiction to consider the merits of the case (see *Hotel Equotarial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363). It follows, therefore, that the court is not involved in the evaluation of evidence which transpired at the disciplinary proceeding as stated by Abdoolcader J in *Mak Sing Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 at p 178:

> Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker v Minister of Health* [1938] 1 KB 655, *Jacob v Attorney General* [1970] 2 MLJ 329).

However, what troubles this court is that, from the record, there is no evidence whatsoever to rebut or contradict the exculpatory statement of Ang.

The learned trial judge had misdirected himself when he said in his judgment at p 11:

> Having regard to the charges against the plaintiff and his complete denial of the charges the commission did not err in its discretion not to proceed further by way of an oral hearing.

In her submission, in support of her contention that no oral enquiry was necessary, the learned SFC cited the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114. The facts in that case are distinguishable. In that case, the alleged bribe was paid directly to the officer concerned and not through a third party as here.

There is nothing in law which prohibits a disciplinary authority from holding an oral hearing or enquiry. The decision whether to hold an enquiry or not would depend on the circumstances of each case. Under the circumstances of this case, the fact that there is no evidence whatsoever to contradict the exculpatory statement of ASP Ang, the holding of an oral hearing or enquiry would, in our view, be justifiable. It follows, therefore, by such omission, it tantamounts to failure on the part of PSC to afford ASP

Ang a reasonable opportunity of being heard. In this regard, I am fortified by the observation of Jemuri Serjan CJ Borneo (as he then was) when he said in *Ghazi* at p 130:

> Similarly, in this case, we have examined the relevant provisions of Chapter D of the 1980 General Orders, and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry *under the circumstances of this case* was not justified. (Emphasis added.)

Meaning it is justifiable for oral hearings to be held under certain circumstances (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308).

Further, the statement of witnesses and reports, although they were circulated to members of PSC, were not supplied to ASP Ang. That being the case, it becomes all the more necessary for oral hearings to be held. In this regard, I refer to the case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169. In that case, unlike this case, the officer concerned, Inspector Kanda, was supplied with a report of board of inquiry. The question arose whether the hearing by the adjudicating officer was vitiated by Inspector Kanda not being given any opportunity of correcting or contradicting the report. In that case, in the judgment of Lord Denning, at pp 172–173, his Lordship said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v Rice* [1911] AC 179, 182; 27 TLR 378) down to the decision of their Lordships Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 (PC)). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated If the other side has had access to the Judge without his Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109) and *Goold v Evans* [1951] 2 TLR 1189), to which might be added *Rex v Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445), and many others.

In the premise and for reasons given above, we hold that the proceeding which resulted in the dismissal of ASP Ang was not conducted in accordance with natural justice as enshrined under art 135(2) of Federal Constitution. In the result, we allow the appeal with costs here and the court below and we make the following orders:

(i) we set aside the order of dismissal against ASP Ang and order that ASP Ang be reinstated in the police force;

(ii) with regard to prayer two of the statement of claim, we remit the case to the court below for assessment by the learned registrar. A

My learned brothers Mokhtar Sidin JCA and Alauddin JCA have read this judgment in draft and have expressed their agreement with the same.

Appeal allowed.

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Reported by Lim Lee Na

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